for The Defense

The Training Newsletter for the
Maricopa County Public Defender's Office

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Maricopa County Public Defender

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Court Coverage Guidelines: The Care and Feeding of the Warm Body

by James Haas[1]

Few things in our practice generate more dissatisfaction than the court coverage (aka "warm body") system. Attorneys hate it because it takes a half-day out of a crowded week, and it is, for the most part, wasted time. Judges, while they generally like the idea of having someone to sneer at when things don't go as smoothly as they would like, complain that most warm bodies have no idea what is going on with a case when they have questions.

But the people who like the system least, and with good reason, are our clients. To them, the warm body system seems like a way for their attorney to avoid contact with them at the times when they need it most. The court coverage system tells the client that he is just an insignificant ripple in the cosmic sea, that public defenders are fungible, and that the only person he hoped he could trust doesn't really care about him. The most common client complaint is that their lawyer has failed to keep in contact, and this usually includes the fact that another lawyer, who didn't know anything, appeared with the client in court.

The court coverage system was created to assist lawyers in emergencies, when they are unable to make a court appearance because of unanticipated circumstances. Unfortunately, the system is now taken for granted, and has evolved into a convenient way to resolve scheduling conflicts, at best, and a method of avoiding our responsibilities, at worst.

To make matters worse, there is little consistency in the way court coverage is performed and used from group to group, and lawyer to lawyer. The diligent attorney uses the warm body rarely, and resents the fact that he or she is expected to do for others things that he or she would never ask another to do. Some attorneys (and they are few) use the warm body routinely, as a convenience, especially for what they regard as insignificant matters, such as pretrial conferences.

We should all be on the same page when it comes to the proper use of the court coverage system. The system should be used as it was intended, as a last resort in an emergency. To function effectively, the court coverage system must be flexible, and it is therefore difficult to set forth a lot of hard and fast rules for the use of the warm body. There are, however, several guidelines on which most experienced public defender practitioners agree:

1. *Use court coverage only in exceptional circumstances.*

The client has a right to have his attorney appear with him in court. To the client, there are no insignificant court appearances. The client justifiably feels that his attorney does not care about him when his attorney has someone else, who knows nothing about the client or his case, appear in court for him. The warm body cannot answer his questions, or the judge's, for that matter, and this makes the entire office look unprofessional. Attorneys should always do their own appearances, except in emergencies.

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2. *Never ask a warm body to do a change-of-plea, a sentencing or disposition, or a motion which requires oral argument of any sort.*

This is simply bad practice. These kinds of proceedings require a thorough knowledge of the intricacies of the case and the client, and no warm body should be expected to study your case to do your work. Particularly with pleas, there are simply too many things that can go wrong, and too many questions that come up. Again, the client has a right to expect his attorney to help him through these proceedings.

The court coverage system tells the client that he is just an insignificant ripple in the cosmic sea, that public defenders are fungible, and that the only person he hoped he could trust doesn't really care about him.

3. *If you must have a warm body cover something, make sure your client knows about it in advance.*

Few clients have a problem with having a warm body appear for them when they know exactly who and why, and what will happen. Clients come to court expecting something substantial to happen, and they come with questions for their attorney. If you deal with this before the court date, your client will be satisfied that your giving the case temporarily to another lawyer is not an indication that you don't care.

4. *If you cannot talk to your client about the need for warm body representation before the court appearance, make sure you talk to him as soon as possible afterward.*

You will have situations, such as illness, when you cannot talk to the client in advance. Your client may be concerned, even angry, when he comes to court and you are not there. If possible, at least talk to the warm body in advance and ask him or her to apologize to the client, explain the reason for the absence of his attorney, and promise him that his attorney will be talking to him as soon as possible. Then keep that promise.

5. *Talk to the warm body about the case, the client, and the reason for your absence in advance.*

There is nothing more impersonal than picking up a file in the warm body basket right before the court appearance, and reading the instructions on the way to court, or worse yet, reading them in the presence of the client. Now you've convinced your client, *and your colleague*, that you really don't care about them or your work. Except under the most exceptional circumstances, you should be able to spend a few minutes telling the warm body what you need, what to tell your client, and what to expect from your client. This makes his or her job much more manageable, and it will be appreciated.

6. *Anticipate, and avoid, scheduling conflicts.*

Most scheduling conflicts can be avoided by making a habit of having your calendar in hand whenever a judge is setting a hearing. Ask the judge to check with you about conflicts before he sets something. Most will readily do so. In your coverage court, set everything on your coverage day. Outside of your coverage court, avoid setting things on your coverage day. Always avoid setting things on your justice court coverage day. If a matter is scheduled without your input, and you have a conflict, you can usually avoid it with a phone call to the judge's secretary and the prosecutor. Avoiding conflicts is easy once it becomes a habit. Resolving conflicts is easy if you act as quickly as possible.

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FOR THE DEFENSE

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7. *If you are acting as court coverage, don't be afraid to say "no."*

If someone asks you to do something as a warm body that makes you uncomfortable, it is probably an inappropriate thing for you to be doing. Don't be afraid to refuse to do it. If you find yourself in court when you discover that you've been given something inappropriate to do, try to call the attorney who gave you the file. If you can't find him or her, tell the client, the judge, and the prosecutor about the problem, preferably off the record and out of hearing of others in the courtroom. Do your best to protect the office and the attorney who gave you the file, but make it clear that you think the attorney of record should be handling the matter, and ask for a continuance, if necessary. When you have a chance to speak to the attorney who gave you the file, tell him or her what happened and why, and that you will not handle such matters in the future. If there is a problem, talk to your supervisor. If your supervisor doesn't know who is abusing the system, there is nothing he can do to resolve the problem.

The proper use of court coverage is really a question of how we want to treat our clients and our fellow attorneys.

8. *If you have a matter in more than one court, be sure to stop in each one to let the court coverage attorney know where you are and when you will be back.*

This doesn't really deal with your use of the warm body, but it is nonetheless vital to the operation of the system. The warm body's duty is to see that everything is covered. If you haven't given him or her a file, he or she assumes that you will be there to handle your own matter. If you don't show up for an hour or more, the warm body will start to get nervous. He or she will have to make phone calls, go to other courts, and talk to other attorneys about whether they've seen you. The warm body should never have to do this. It is a simple thing to drop into each court in which you have a matter to talk to the warm body, and to check in periodically until you can finally stay. It helps a lot, and may even allow the warm body to leave the court and go back to work before the end of the calendar, depending on the idiosyncracies of the judge. Your colleague will really appreciate that.

Surprisingly, although Arizona has a fairly long list of statutory collateral consequences for felony convictions, some aspects of the law are actually favorable to our clients!

The proper use of court coverage is really a question of how we want to treat our clients and our fellow attorneys. Ideally, we could do away with the system and simply make everyone responsible for handling their own matters, including finding someone to fill in when emergencies arise. As a practical matter, some kind of coverage system is a necessity in an office as large and as busy as ours. Since we have a system in place, it is all too easy to take coverage for granted, begin to overuse it, and develop bad habits. We need to take care to use the system as it was intended. Our client, and our colleagues, deserve no less.

[1] Trial Group Supervisor - Group A

GIVING CONS A BREAK: Civil Rights Conviction Consequences

By Christopher Johns

Few politicians are eager to defend the rights of the accused, let alone the convicted. In a previous *for the Defense* issue, a statutory list of collateral conviction consequences was given (*Collateral Effects of Plea Agreements*, Vol. 3, Issue 2 -- Page 5). The furor over James Hamm has also raised some ire about what convicted felons may and may not do.

Surprisingly, although Arizona has a fairly long list of statutory collateral consequences for felony convictions, some aspects of the law are actually favorable to our clients! On the other hand, many have little rational relation to legitimate public protection. The important practice issue is being able to fully advise the client of what will be lost and what may be regained in the nature of civil rights.

Right to Vote

While such issues as forced HIV (A.R.S. § 13-1415) and DNA testing (A.R.S. § 13-281), and loss of public benefits (A.R.S. § 13-3418) must be discussed with a client, the most fundamental issue of which the client must be informed is that a felony conviction *suspends* the rights to vote, hold public office, and serve on a jury. Ariz. Const. art. 7, § 2; A.R.S. § 13-904(A)(1)-(3); 16-101; 21-101. Interestingly enough, three states (Maine, Massachusetts and Vermont) allow inmates to vote.[1]

Additionally, suspended during a client's imprisonment are "any other civil rights the suspension of which is reasonably necessary for the security of the institution in which the person is confined or for reasonable protection of the public." A.R.S. § 13-904(A)(4).

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As most practitioners already know, a client's conviction does not make her incompetent as a witness in a "criminal proceeding." A.R.S. § 13-904(B). And even though a person may be convicted, Arizona law does not prevent the person from acknowledging a sale or real property conveyance.

Public Employment

Clients may also be advised that, at least under the law, a person may not be disqualified from public employment, nor may a person whose civil rights are restored be denied an occupational or professional license, permit, or certificate *solely* because of a conviction. A person may, however, be denied *public employment*, and a person whose civil rights have been restored may be denied a *license* "if the offense has a reasonable relationship to the functions of the employment or occupation for which the license, permit or certificate is sought." A.R.S. § 13-904(E). Examples of such occupations are: insurance agent (A.R.S. § 20-316); certified public accountant (A.R.S. §§ 32-721, 741); dentist (A.R.S. §§ 32-1263, 32-1290); nurse (A.R.S. § 32-1663); pharmacist (A.R.S. § 32-1927).

It is also important to advise clients that for a first-time felony offender in Arizona (state or federal), civil rights, except for the right to bear arms, are *automatically* restored upon completion of the term of probation (or upon an unconditional discharge from imprisonment and on completion of payment of *any fine or restitution*).

Rights Restoration

It is also important to advise clients that for a first-time felony offender in Arizona (state or federal), civil rights, except for the right to bear arms, are *automatically* restored upon completion of the term of probation (or upon an unconditional discharge from imprisonment and on completion of payment of *any fine or restitution*). A.R.S. § 13-912.[2]

Even if a person is not a first-time offender, her civil rights may be restored. A person convicted under Arizona law of more than one felony may have her civil rights restored by the sentencing court two years after absolute discharge from prison (or if sentenced to probation, after its completion). A.R.S. § 13-906.

A person convicted of more than one federal felony offense may also apply for civil rights restoration two years after absolute discharge. A.R.S. §§ 13-909(A) and 13-910. In both instances the application for civil rights restoration must be made to the presiding judge of the Arizona county where the person presently presides. The application must be accompanied by a department of corrections certificate of absolute discharge. There are, however, no Arizona provisions for restoring civil rights lost as a result of an out-of-state felony conviction. The above provisions only apply to Arizona and federal convictions.

They should also be told that the automatic civil rights restoration provisions for first-time offenders *does not* apply to a person's right to possess weapons as defined in A.R.S. Section 13-3101.

Conviction Set Aside

Arizona law also permits certain offenders[3] to have their convictions set aside by the sentencing court after successful probation or sentence completion and discharge.[4] Having a conviction set aside is generally thought to release a person *from all penalties and disabilities* resulting from the conviction. In the language of the statute, the judgment of guilt is set aside. The court actually orders that the state "dismiss the accusations or information" and that the person is "released from *all* penalties and disabilities resulting from the conviction, except those imposed by the department of transportation . . . ."

It should be noted, however, that A.R.S. § 13-907 does still permit use of the conviction in any subsequent prosecution by the state or a subdivision. Again, however, it would appear that this section does *not* remove firearm disabilities.[5]

The Arizona Constitution also provides that the Governor has the authority to grant pardons, except in cases of treason or *impeachment*. Ariz. Const. art. 5, § 5. A pardon has the effect of restoring a person's civil rights, including their firearm privileges. It may not, however, be obtained in Arizona for a federal conviction or from another state.

Firearms

Particularly in a state like Arizona, where guns are very much incorporated into the culture, questions about firearms possession often arise from clients. The bottom line is that clients must be told that a person convicted within or outside Arizona of any "felony involving violence or possession and use of a deadly weapon or dangerous instrument" is a prohibited possessor. They may not possess a deadly weapon (revolver, pistol, rifle or shotgun) if their civil rights have not been restored by court action. A.R.S. §§ 13-3101 and 13-3102. They should also be told that the automatic civil rights restoration provisions for first-time offenders does not apply to a person's right to possess weapons as defined in A.R.S. § 13-3101. For a first-time offender to possess a weapon, he must make an application to the court under the provisions of A.R.S. § 13-906.

The Bureau of Alcohol, Tobacco and Firearms (ATF) will not grant relief from federal firearm disabilities to felons living in Arizona who are prohibited possessors. Persons convicted of nonviolent felonies, however, may obtain restoration of their federal firearms privileges through the ATF. Violent federal felons may only regain their federal firearm privileges through a presidential pardon.

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Public Policy Issues

While it is important as a practitioner to be able to advise clients, attorneys interested in civil rights law may also note there are considerable public policy implications from the loss of the right to vote, even while the person is in prison.

As previous *for the Defense* articles have noted, many of Arizona's criminal statutes have a disproportionate impact on minorities. Those watching the debate in Congress over the federal crime bill may also be aware that Representative Craig Washington (D-Tex) has introduced an "alternative crime bill." Some of its provisions would eliminate some mandatory federal prison sentences, correct the present imbalance of "crack" versus "powder cocaine" sentences, and guarantee the right to vote in federal elections to ex-convicts and to convicts serving non-prison sentences. Some attorneys, particularly in southern states, have considered using the Voting Rights Act as another way to attack the discriminatory impact the criminal justice system is having on African-Americans.

The argument for having convicted felons vote and encouraging them to use the right to vote, which in Arizona they may easily regain, is that it has rehabilitative attributes. It should give our clients a sense of belonging instead of isolationist feelings toward society. Disfranchisement is a dehumanizing collateral consequence of a felony conviction. It is extremely important to advise clients that they may regain this right and participate in the community again.

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[1] In an alternate crime bill submitted by Representative Craig Washington, the right to vote in federal elections would have been guaranteed to ex-convicts and to convicts serving non-prison sentences. Since it is pretty much open season on convicts this year in Congress, and in most state legislatures, the Washington bill legislation doesn't have a prayer.

[2] A good argument may be made that this is really important to tell clients. Perhaps because we take it for granted, it is easy to forget how important this most basic political right is. Disfranchisement is a dehumanizing collateral consequence of any felony conviction. It expels the "convict" permanently from society.

[3] Convictions may not be set aside for crimes involving infliction of serious physical injury, use or exhibition of a deadly weapon or instrument, sex crimes or if the victim is under 15, and some Title 28 offenses.

[4] Offenders are supposed to be advised of this right according to A.R.S. § 13-907(A) at the time of discharge.

[5] *See United States v. Herrel*, 588 F.2d 711 (9th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979) concluding that similarly worded predecessor statute did not eliminate state conviction as basis for federal felon in possession charge under 18 U.S.C. § 922.

Training

1994 National Criminal Defense College ("the search for Otis")

The National Criminal Defense College (NCDC) in Macon, Georgia will conduct two sessions again this summer. The sessions are in June and July. The Office usually is allotted one slot for one of the sessions (sometimes two).

Attorneys who are interested in attending should send the training director a memorandum or note indicating their interest by Friday, February 25, 1994. Normally, we submit four candidates for the College. Selection of Office candidates will be based on time with the Office and recommendations by supervisors. The Office pays the entire tuition, which includes hotel accommodations and money for meals.

This is the "Cadillac" of criminal defense colleges. Faculty includes everyone from E.E. "Bo" Edwards, Eugene Iredale, Albert Krieger, Andrea Lyon, Terry McCarthy, and Larry Pozer to Howard Weitzman. It is the experience of a lifetime for improving trial skills.

Additionally, although warm in the summer and while there is not much free time, visiting Duane Allman's grave is a must. Otis Redding is also buried a few short miles outside of Macon (see the training director for details of the "search for Otis Redding[1]'s grave).

For more information, copies of the NCDC program brochure are available from Heather in the training division. Recent Office attendees include Christopher Johns, Roland Steinle, Susan Bagwell, and Peg Green.

Drug Identification Seminar

On February 9, the Office will sponsor a seminar on drug identification for both support staff and attorneys. The session will cover the "look", use, and effects of drugs commonly used by our clients. This drug familiarization course is the same one given at the Phoenix Police Department Academy and to other government agencies. This presentation should be helpful in understanding issues related to many office cases.

The seminar will be held 1:30 - 4:30 p.m. in the Maricopa County Public Defender's Office Training Facility (Suite 10, Luhrs Arcade). If you would like to sign up, please contact Georgia Bohm in the Training Division.

Work Furlough Program

On Friday, February 18, Mark Stodola from the Maricopa County Adult Probation Department will speak on the changes in their Work Furlough Program and in the Sheriff's Office, and how these changes affect our clients. The training, designed for both attorneys and support staff, will be held in our Training Facility (Suite 10, Luhrs Arcade), 10:00 - 11:00 a.m. To register, contact Georgia Bohm.

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Ergonomics and the Law Office

The "Ergonomics and the Law Office" seminar for support staff, originally planned for January 26, has been changed to Wednesday, March 02 because of a conflict in the speaker's schedule. Darren Robinson from the county's Behavioral Risk Management/Wellness Services will discuss ergonomics: the science of examining people's performance and well-being in relation to their job tasks, equipment and environment. The training also will address how to arrange a workstation to enhance health and productivity, and how to use "microbreaks." The seminar will be held in the Training Facility (Suite 10, Luhrs Arcade), 9:30 - 11:00 a.m. Anyone interested in attending should contact Georgia Bohm.

1994 Advanced Cross Seminar

Between March 11 and 13, NCDC will also host another advanced cross-examination seminar. This time the presentation will be in Seattle. If you have not attended an out-of-state seminar while working for the Office, consider requesting attendance at this time. Trial Group Supervisors should be contacted for a recommendation to attend. Also, attorneys who have attended an out-of-state seminar more than a year ago and who have not attended the Advanced Cross Seminar will be considered.

Public Defender Trial College

The Office is working on putting together our "Second Annual Trial Advocacy" Course. It will be held at ASU between March 16 and 18. Plans include space for about 20 attorneys to attend. We are working on having faculty who have taught at the NCDC or NLADA trial colleges. The trial group coordinators and the training director will also be faculty. Local actors will be used to play the roles of witnesses for the cross-examination exercise. The focus of the training will be "Open-Cross-Close."

If you are interested in attending, please contact Russ Born or Christopher Johns.

Fourth Amendment Seminar

In April or May, the Office will sponsor a seminar geared toward 4th Amendment Issues. There will be a substantive 4th Amendment update, and segments on conducting interviews and preliminary hearings in anticipation of a suppression motions, as well as a session on how to conduct a suppression hearing. Attorneys with suggestions for other segments or speakers should contact the training director.

Ethics Seminar

If you are planning for your MCLE Ethics requirement, remember that beginning this year you must have 3 CLE ethics hours. The Office will sponsor a 3-hour ethics seminar before the end of June. Contact the training director or Bob Doyle if you have any specific areas that you would like to see covered at an ethics seminar.

[1] On a musical note, the new boxed CD complete Otis Redding anthology is a must if you're into 60's rock and good ole plain R&B. ^CJ

The Devil's Criminal Law Dictionary

by Donna Lee Elm

JUSTICE: A commodity which in a more or less adulterated condition the State sells to the citizen as a reward for his allegiance, taxes, and personal service.[1]

When Ambrose Bierce wrote *The Devil's Dictionary* a century ago, the publisher renamed it *The Cynic's Dictionary*, probably to placate polite society that would be offended by its biting sarcasm. That title implied that Bierce's characterizations weren't really true -- he's just being cynical. But there is a unsettling ring of truth to them. Since we are criminal practitioners, we should bear in mind what non-practitioners, like Bierce, think of us and the practice.

LAWYER: One skilled in circumvention of the law.

This remains a common perception of attorneys in general and the defense bar in particular. Though lawyers are distrusted, we were and still are regarded as a necessary evil.

FORMA PAUPERIS: In the character of a poor person -- a method by which a litigant without money for lawyers is considerately permitted to lose his case.

The good news is that since Bierce wrote that, indigent representation was mandated. The bad news is that many of our clients still believe they will face the same outcome with public defense.

Of course, Bierce did not lambast just attorneys. He gave equal time to our clientele:

FELON: A person of greater enterprise than discretion, who in embracing an opportunity has formed an unfortunate attachment.

MISDEMEANOR: An infraction of law having less dignity than a felony and constituting no claim to admittance into the best criminal society.

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HABEAS CORPUS: A writ by which a man may be taken out of jail when confined for the wrong crime.

PARDON: To remit a penalty and restore to a life of crime. To add to the lure of crime the temptation of ingratitude.

Bierce distrusted the justice system. Though it is premised upon lofty ideas, human nature often gets in the way. We are self-protective, and our ends are often self-serving. We harbor prejudices against those different from us. We are competitive. Bierce therefore turned his probing cynicism on triers of facts, the judges and jurors who could wield their power to meet their own needs:

LAWFUL: Compatible with the will of a judge having jurisdiction.

DELIBERATION: The act of examining one's bread to determine which side it is buttered on.

IMPARTIAL: Unable to perceive any promise of personal advantage from espousing either side of a controversy or adopting either of two conflicting opinions.

Bierce, like many of our clients, held little hope for the criminal justice system. Once charged, a defendant's options are limited almost invariably to two choices of trial or compromise by plea agreement -- neither of which is often palatable. Plea agreements may be expedient but unsatisfactory compromises:

COMPROMISE: Such an adjustment of conflicting interests as gives each adversary the satisfaction of thinking he has got what he ought not to have, and is deprived of nothing except what was justly his due.

Trial, on the other hand, risks that human nature and personal agendas will trump the ideals of law:

TRIAL: A formal inquiry designed to prove and put upon record the blameless characters of judge, advocates and jurors. In order to effect this purpose it is necessary to supply a contrast in the person of one who is called the defendant, the prisoner, or the accused. If the contrast is made sufficiently clear this person is made to undergo such an affliction as will give the virtuous gentlemen a comfortable sense of their immunity, added to that of their worth.

You cannot just dismiss Bierce as a cynic. Haven't we all seen a juror who takes more self-righteous satisfaction in convicting an accused than just performing his civic duty would call for? A smart prosecutor cultivates the us-him contrast between jurors and an accused; a smart defense attorney minimizes it by getting the jurors to identify with the client.

Bierce, too, thought little of the evidence that a jury could hear before deciding a case. For instance:

PROOF: Evidence having a shade more of plausibility than of unlikelihood. The testimony of two credible witnesses as opposed to that of only one.

Bierce saved his most scathing criticism for what evidence the jury could *not* hear.

INADMISSIBLE: Not competent to be considered. Said of certain kinds of testimony which juries are supposed to be unfit to be entrusted with, and which judges, therefore, rule out, even of proceedings before themselves alone. Hearsay evidence is inadmissible because the person quoted was unsworn and is not before the court for examination; yet most momentous actions, military, political, commercial and of every other kind are daily undertaken on hearsay evidence.... No single assertion in the Bible has in its support any evidence admissible in a court of law. It cannot be proved that the Battle of Bendheim was ever fought, that there was such a person as Julius Caesar, such an empire as Assyria.... But as records of courts of justice are admissible, it can easily be proved that powerful and malevolent magicians once existed and were a scourge to mankind. The evidence (including confession) upon which certain women were convicted of witchcraft and executed was without a flaw; it is still unimpeachable. The judge's decisions based on it were sound in logic and in law.... If there were not witches, human testimony and human reason are alike destitute of value.

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[1] Bierce, A. *The Devil's Dictionary* (1957). All definitions in this article are quoted from this book.

December Jury Trials

November 24

Dennis Farrell: Client charged with aggravated DUI. Trial before Judge Brown ended December 30. Client found guilty. Prosecutor P. Hearn.

November 29

Brad Bransky: Client charged with one count of armed robbery, two counts of kidnapping, four counts of sexual assault, and misdemeanor assault. Investigator B. Allard. Trial before Judge Martin ended December 1. Client found **not guilty**. Prosecutor J. Beatty.

Robert Ellig: Client charged with four counts of child molestation. Investigator H. Brown. Trial before Judge Hilliard ended December 8. Client found **not guilty** on one count and **judgment of acquittal** on 3 counts. Prosecutor Jorgensen.

Candace Kent: Client charged with manslaughter. Investigator J. Castro. Trial before Judge Galati ended December 7. Client found guilty. Prosecutor S. Novitsky.

Dan Sheperd: Client charged with possession of narcotic drugs. Trial before Judge Hotham ended December 2. Client found guilty. Prosecutor Hinchcliffe.

Robert Ventrella: Client charged with burglary. Trial before Judge Cole ended December 2. Client found guilty. Prosecutor Kane.

December 1

David Goldberg: Client charged with aggravated assault. Trial before Judge Dann ended December 9. Client found **not guilty**. Prosecutor S. Canter.

December 6

Rickey Watson: Client charged with aggravated assault and kidnapping (with priors). Investigator M. Breen. Trial before Judge Grounds ended December 9. Client found **not guilty**. Attorney General Todd.

Kevin White and Tim Ryan: Client charged with fifteen counts of sexual abuse. Investigator G. Beatty. Trial before Judge Skelly ended December 8. Client found **not guilty**. Prosecutor R. Campos.

December 7

Jeff Reeves: Client charged with three counts of burglary. Trial before Judge Schneider ended December 9. Client found guilty. Prosecutor R. Wakefield.

Valerie Shears: Client charged with sale of narcotic drugs. Trial before Judge Trombino ended December 13 with a hung jury. Prosecutor D. Schlittner.

December 8

Barry Handler: Client charged with possession of dangerous drugs and possession of marijuana (with priors). Trial before Judge D'Angelo ended December 9. Client found **not guilty** on possession of dangerous drugs and guilty on possession of marijuana. Prosecutor S. Lynch.

Tom Kibler: Client charged with burglary and aggravated assault (with 1 prior). Trial before Judge O'Melia ended December 14. Client found guilty. Prosecutor R. Hinz.

Ray Schumacher: Client charged with theft, burglary, possession of dangerous drugs, and possession of burglary tools. Investigator T. Thomas. Trial before Judge Roberts ended December 13 with a hung jury. Prosecutor N. Miller.

December 9

Kevin White and Todd Coolidge: Client charged with two counts of aggravated assault. Investigator T. Thomas. Trial before Judge Portley ended December 17. Client found guilty. Prosecutor C. Smyer.

December 13

Peg Green: Client charged with two counts of aggravated assault. Investigator D. Beever. Trial before Judge Anderson ended December 23. Client found guilty (with two priors). Prosecutor D. Rodriguez.

Charles Vogel: Client charged with burglary and theft. Investigator B. Abernethy. Trial before Judge Cole ended December 20. Client found guilty. Prosecutors Carrie & Macias.

December 14

Larry Grant: Client charged with aggravated assault (dangerous). Trial before Judge Seidel ended December 15. Client found guilty of simple assault (misdemeanor). Prosecutor V. Harris.

Jerry Hernandez: Client charged with kidnapping, burglary, and aggravated assault. Trial before Judge Hendrix ended December 15. Client found guilty on kidnapping and aggravated assault charges; hung jury on burglary charge. Prosecutor T. McCauley.

Daniel Treon: Client charged with aggravated assault. Investigator B. Abernethy. Trial before Judge Schwartz ended December 22. Client found **not guilty**. Prosecutor D. Cunanan.

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December 20

Patricia Ramirez: Client charged with burglary (with 2 priors). Investigator D. Beever. Trial before Judge Brown ended December 22. Client found **not guilty** on burglary and guilty of criminal damage. Prosecutor M. Brnovich.

December 29

Barbara Spencer: Client charged with DUI. Trial before Judge McBeth ended December 29. Client found **not guilty**. Prosecutor C. Whitten.

Correction:

In our December issue, a November 2 trial for Darius Nickerson was inaccurately reported. The correct information follows:

Darius Nickerson and Jim Lachemann: Client charged with first degree murder, attempted first degree murder, aggravated assault (dangerous), and felony flight (all while on probation). Client found **not guilty** of attempted first degree murder; guilty of second degree murder, aggravated assault and felony flight.

Arizona Advance Reports

Volume 143

State v. Crisp,
143 Ariz. Adv. Rep 3 (Div. 1, 7/8/93)
Trial Judge John Seidel

Defendant was charged and convicted of soliciting an act of prostitution. Defendant claims that the city ordinance includes no culpable mental state and is unconstitutional. This is not a strict liability offense. The use of the words "solicits or hires" includes a culpable mental state. To solicit or hire means that, by one's words and conduct, one intends to secure the illegal act. The culpable mental state of intent is implied by the language of the statute.

Defendant also claims that the statute is overbroad because it impinges on free speech by failing to specify the requisite mental state. Words spoken with the intent to bring about the commission of a criminal act are not protected speech. The ordinance does not sweep protected speech within its reach.

Defendant contends that the ordinance is vague because people must guess about the meaning of the statute. Due process does not require absolute precision. The ordinance prohibits urging, asking, enticing, requesting, commanding or engaging another person to perform a sexual activity for payment. The ordinance is not vague.

Defendant also claims that the city ordinance conflicts with state law governing prostitution. The state statute requires a mental state of knowingly, rather than the strict liability city ordinance. The city ordinance actually requires a mental state of intentionally. The state did not intend to preempt the field of regulation of prostitution. No conflict exists.

State v. Bews,
143 Ariz. Adv. Rep. 15 (Div. 2, 7/15/93)
Trial Judge Rufus C. Coulter, Jr.

Defendant was a witness at her boyfriend's homicide trial. She testified for her boyfriend at his first two trials. Later, she met with a prosecutor and a police detective. The defendant was then facing various drug charges. Defendant told the prosecutor and detective that she had lied during her boyfriend's previous trials. At her boyfriend's third trial, defendant testified consistently with her previous trial testimony. Defendant also admitted that her statements to the prosecutor and detective were lies. Defendant was charged with giving false statements to the detective and the prosecutor. Defendant moved to dismiss arguing that the facts alleged in the indictment do not constitute an offense and that the unsworn falsification statute is unconstitutional. The trial court granted defendant's motion to dismiss and the state appealed.

A person commits unsworn falsification by knowingly making any false statement on a material issue to a public servant in connection with any official proceeding. An official proceeding is one heard before any legislative, judicial, administrative or other governmental agency or official authorized to hear evidence under oath. Defendant claims that her false pretrial statements were not made "in connection with" any official proceeding. Connection is defined as a relationship or association in thought. Pretrial interviews conducted in preparation for trial bear a sufficient relationship to the trial itself to constitute being performed in connection with the trial. The fact that the statements were not made during the trial itself is not controlling because that would render meaningless the words in the statute.

Defendant also argues that the statute does not apply because neither the detective nor the prosecutor is authorized to take oaths. The official proceeding must be held by an entity or official authorized to hear evidence under oath. That requirement is satisfied where the trial was held in superior court and those proceedings were conducted under oath. The statute does not require that the statement be made to a person authorized to take oaths.

Defendant also claims that the statue is overbroad and vague. Because the defendant engaged in some conduct that is prescribed by the statute, she has no standing to complain that it might be vague when applied to the conduct of others. [Represented on appeal by Garrett W. Simpson, MCPD.]

(cont. on pg. 10)

Trebesch v. Superior Court,
143 Ariz. Adv. Rep. 17 (Div. 1, 7/13/93)
Trial Judge Robert Murphy

The trial judge appointed the public defender to represent a prison inmate on an emergency psychiatric transfer petition. Emergency psychiatric transfer proceedings are outside the statutory duties of the public defender. The language of A.R.S. § 11-584 prohibits public defenders from defending persons outside the scope of the statute. [Represented on special action petition by Leslie Newhall and Russell Born, MCPD].

State v. Andersen,
143 Ariz. Adv. Rep. 24 (Div. 1, 7/20/93)
Trial Judge Richard Anderson

Defendant was indicted on charges of first degree murder and aggravated assault. He was convicted of negligent homicide, a dangerous offense. Defendant contends that he was improperly sentenced as a dangerous offender because the dangerous nature of the felony was not determined by the jury as required by A.R.S. § 13-604(K). Defendant failed to object at trial and is only entitled to relief if fundamental error occurred. Imposition of the enhanced sentence was valid if the dangerous nature of the felony was charged and admitted or found by the trier of fact. At trial, defendant admitted exhibition of a rifle. He acknowledged that he and the victim were hassling over a gun that went off. Submitting the allegation of dangerousness to the jury was unnecessary where the defendant's own admissions prove the allegation.

Defendant claims that the trial court erred when it found the potential danger to a second person as an aggravating factor at sentencing. Defendant contends that using this as an aggravating factor was improper because he was acquitted of the aggravated assault charge. Defendant failed to object and the matter is reviewed only for fundamental error. Conduct which results in an acquittal may be considered to aggravate a sentence. The jury was only instructed regarding defendant's intentional conduct. The jury was not asked to determine whether the defendant was reckless or negligent. The defendant's reckless conduct was a proper aggravating factor.

Defendant claims he received ineffective assistance of counsel. His attorney failed to call a witness to testify, did not request a self-defense verdict form, and failed to adequately prepare for sentencing. Defendant has failed to show that the witness's testimony would have been of any use rebutting the charge of negligent homicide. Defendant was not entitled to a self-defense instruction because there was not even the slightest evidence to support such an instruction. Defense counsel was also not ineffective for not requesting a mitigation hearing where counsel's presentence memorandum and comments at sentencing covered the necessary points.

Defendant claims he also has newly discovered evidence of a witness's affidavit. One of the requirements to establish a colorable claim of newly discovered evidence is that the evidence must appear on its face to have existed at the time of trial but be discovered after trial. The affidavit shows that the evidence was discovered before trial.

Defendant also claims that he is no longer required to pay restitution to the victim's family. After sentencing, the defendant agreed to the entry of judgment against him with a provision that the judgment would not be executed against defendant's personal assets. The parties stipulated that upon execution of the agreement all restitution ordered by the court in the criminal action is declared paid and satisfied. Settlement of a civil lawsuit may extinguish a defendant's restitution obligation. If an agreement extinguishes any right of restitution that the victim's family has against a defendant, the restitution order should be vacated.

State v. Witwer,
143 Ariz. Adv. Rep. 34 (Div. 1, 7/20/93)
Trial Judge Robert L. Gottsfield

Defendant was charged with sexual abuse, a class 5 felony. Defendant testified that the victim consented to his touching her. Defendant was convicted as charged.

Defendant claims that the jury was not properly instructed on the definition of "without consent." Defendant argues that his actions are not within the statutory definitions of "without consent" and therefore are included among those with consent. The statute reads that "Without consent *includes* any of the following:". The word includes is a term of enlargement which conveys the idea that conduct which does not fall within listed behavior may also violate the statute. The jury was properly instructed.

At trial, the jury was instructed that a person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person 14 or more years of age without consent of that person. Defendant argues that the instruction was inadequate and that the jury should have been instructed that without consent means that the defendant was aware or believed that the other person was coerced by the immediate or threatened use of force. In a prosecution for sexual abuse, the state must prove that the defendant intentionally and knowingly engaged in sexual conduct and that the defendant knew that such contact was without the consent of the victim. The defendant's instruction takes too narrow a view of how the offense might be committed because it would not allow for the commission of the offense by any means other than coercion.

Defendant claims that the trial judge should have instructed the jury that it had to agree unanimously as to which touches occurred without the victim's consent. Defendant failed to request this instruction at trial and has preserved the issue only for fundamental error. It is not error to instruct the jury that they must agree unanimously on what particular act or acts occurred which constituted the crime. The entire incident between the defendant and the victim was a single episode spanning no more than 45 minutes. The case was presented and argued by both parties as an all-or-nothing situation. No fundamental error occurred.

(cont. on pg. 11)

Defendant claims it was fundamental error not to instruct the jury that a mistaken belief that the victim consented would be a defense to the charge. While a mistake of fact instruction might have been proper, such an instruction would not have fit the defendant's theory of the case. Defendant's sole theory was that the victim consented and he argued that the victim was not telling the truth. The defendant did not attempt to argue that even if the victim had not consented he mistakenly believed she had. The failure to give such an instruction was not fundamental error. [Represented on appeal by James L. Edgar, MCPD.]

State v. Peralta,
143 Ariz. Adv. Rep. 37 (Div. 1, 7/22/93)
Trial Judge Paul A. Katz

Defendant was convicted of conspiracy to sell dangerous drugs. He was placed on 5 years' probation including a term that he complete the shock incarceration program. The defendant was dismissed from the program and the state petitioned to revoke his probation. The trial judge found that the defendant had violated four different shock incarceration program rules which justified his dismissal from the program. Defendant was sentenced to prison with credit for time served.

Defendant claims that the trial court erred in applying an "arbitrary and capricious" standard of review to determine whether defendant had violated his probation. The trial judge found by a preponderance of the evidence that the Department of Corrections did not arbitrarily and capriciously dismiss the defendant from the program. Defendant failed to object to this standard during the revocation hearing and the trial judge applied the proper standard.

Defendant argues that he was denied due process of law because of the absence of standards to determine the severity of his infractions. The violation of a rule which a probationer is not and could not be expected to be aware of will not support a revocation of probation. However, the rules were explained to the defendant and a copy made available to him. He was familiar with the rules and knew that violations could result in dismissal. He admitted he knew his actions violated the rules and admitted he was given warnings. A probationer's due process rights may be curtailed to preserve discipline or promote rehabilitation so long as the action is neither arbitrary nor capricious. Program officers must have broad discretion to evaluate rule infractions because of the subjective factors involved. Defendant was not denied his due process rights.

Defendant argues that the trial court improperly delegated judicial power to the executive branch by allowing the program to adjudge violations of its rules. A court may not delegate its power to an executive agency. The court did review the executive agency's decision but was not bound by it. If the court had found that the dismissal from shock incarceration was arbitrary and capricious it could have refused to revoke defendant's probation. There was no improper delegation of judicial power.

During sentencing, the trial judge noted that his experience with the Department of Corrections was that they went out of their way to see people stay in the program because it's in the program's best interest. Defendant argues that the trial judge committed fundamental error by deciding the case on matters outside the record. The judge's observations about his experience with the program and his opinion of their policy were the type of common sense consideration that is a permissible part of the decision-making process. No bias or error has been shown. [Represented on appeal by Garrett W. Simpson, MCPD.]

Maricopa County Juvenile Appeal No. JV-114857,
143 Ariz. Adv. Rep. 41 (Div. 1, 7/22/93)
Trial Judge Pamela J. Franks

The state filed a delinquency petition against the juvenile and requested that the matter be transferred for adult prosecution. During the probable cause hearing, the state moved to dismiss several counts because the state's witnesses had not appeared. The court dismissed with prejudice when it found that the state had failed to properly serve the witnesses. The trial court may dismiss with prejudice only if the interests of justice require it. The state's attempt to avoid the running of a time limit may not by itself justify a dismissal with prejudice. The primary consideration must be whether delay will prejudice the defendant. The trial court may not dismiss a juvenile prosecution with prejudice unless the court finds that justice requires it. To dismiss with prejudice under Rule 6.1, the trial court must find that a time limit has been violated and that justice requires dismissal with prejudice. Dismissal under Rule 14 only calls for dismissal without prejudice. [Represented special action by David Katz and Ellen Edge Katz, MCPD]. ^

Bulletin Board

Speakers Bureau

Our Speakers Bureau continues to grow and to serve community needs. Robert Doyle, Training Coordinator for Trial Group B, recently joined the bureau.

Colleen McNally, Trial Attorney in Group B, spoke on January 24 to two eighth-grade classes at Sunrise Middle School. Colleen addressed the reasons a person chooses to be a P.D., the training/background necessary to be a P.D., and a P.D.'s view of the criminal justice system.

Robert Guzik, Chief Trial Deputy, talked to University of Arizona students at Governmental Career Day on January 26. He discussed what public defender work is like, the criteria for becoming an attorney in our office, and the mechanics of applying for employment with our office.

Slade Lawson, Trial Attorney in Group C, will speak in February to a 6th-grade class at Harris Elementary. Slade will discuss the United States Constitution, the Bill of Rights, and how they apply to criminal defense work. ^

FOR THE DEFENSE JANUARY INDEX*

Percentage of inmates infected with HIV in 1991 in state and federal prisons: 2.2%
Number of inmates infected with HIV in 1991 in state and prisons: 17,479
Number of inmates in state and federal prisons in 1991: 792,176
Percentage of deaths in 1991 of all deaths in state prisons attributable to AIDS: 28%
Percentage of deaths in jails between July 1, 1991 and June 30, 1992: 24%
Percentage of prison inmates reporting that they have been tested for HIV in 1991: 51%
Percentage of women prison inmates tested or HIV that reported being seropositive: 3.3%
Percentage of Hispanic prison inmates tested for HIV that reported being seropositive: 3.7%
Percentage of New York state prison inmates that are seropositive: 13.8%
Percentage of federal inmates that are seropositive: 1.0%
Percentage of California state prison inmates seropositive: .7%
Percentage of Arizona state prison inmates seropositive: .5%
Percentage of Nevada state prison inmates seropositive: 2.0
State with the highest number reported prison AIDS deaths: New York
How many adult U.S. residents were in jail on June 30, 1992: About 1 in every 428
Number of juveniles housed in adult jails on June 30, 1992: 2,804
Percentage of white non-Hispanics in total jail population on June 30, 1992: 40%
Total number of persons held in U.S. jails midyear 1992: 444,584
Percentage of overall jail occupancy rate: 99%
Percentage increase since 1970 of the number of jail inmates per 100,000: 120%
Number of blacks in jail per 100,000 in 1984: 339
Number of blacks in jail per 100,000 in 1992: 619

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*Source: U.S. Department of Justice Bureau of Justice Statistics

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Verdicts

The following list shows the average lengths of time that juries take to reach verdicts:

Homicide: 5 hours, 30 minutes
Aggravated Assault: 2 hours, 38 minutes
Burglary: 2 hours, 19 minutes
Narcotics: 2 hours, 12 minutes
Robbery: 1 hour, 50 minutes
Theft: 1 hour, 40 minutes

Source: National Center for State Courts